Supreme Court, U.S.
FILED
NOV 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-637

In The
Supreme Court of the United States
October Term, 1987

CASSANDRA GREEN,
Appellant,

vs.

ARAM FRANKLIN, M.D.,
Appellee.

On Appeal From The Court of Appeal of California

MOTION TO AFFIRM OR DISMISS

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MOTION TO AFFIRM OR DISMISS

Appellee Aram Franklin, M.D., moves for summary affirmance of the judgment of the California Court of Appeal rejecting appellant's contention that California Civil Code section 3333.2 effectuates a taking without just compensation in violation of the Fifth and Fourteenth Amendments. Alternatively, appellee moves that this appeal be dismissed on the ground it does not present a substantial federal question.

STATEMENT OF THE CASE

This is an appeal from a decision of the California Court of Appeal rejecting appellant's contention that California Civil Code section 3333.2, which places a $250,000 ceiling on recovery for noneconomic losses in a medical malpractice action, denies her due process and equal protection and effectuates an unconstitutional taking without just compensation. Appellant does not contend the California Court of Appeal erroneously rejected her due process and equal protection claims; her appeal is limited to her claim under the Takings Clause of the Fifth Amendment.

Appellant's statement of the case adequately sets forth the relevant facts from the record with this exception: According to appellant, her taking argument was rejected by the Court of Appeal because it "felt bound by the California Supreme Court's opinions in *Fein* [*v. Permanente Medical Group*, 38 Cal.3d 137, 695 P.2d 665, 211 Cal.Rptr. 368, *appeal dismissed*, 474 U.S. 892 (1985)] and in an earlier case, *American Bank & Trust Co. v. Community Hospital*, 36 Cal.3d 359 [683 P.2d 670, 204 Cal.Rptr. 671 (1984)], even though neither case had addressed or decided the taking question." Jurisdictional Statement 5. This is hardly a fair characterization of the Court of Appeal's decision. It even implies the Court of Appeal *reluctantly* rejected appellant's constitutional attack. To the contrary, the Court of Appeal said: "Although we think it clear that the arguments raised on this appeal have been definitively answered by our Supreme Court, we have chosen to address plaintiff's contentions in order

to dispel any lingering doubt that MICRA passes constitutional muster." Jurisdictional Statement 9a-10a.

The Court of Appeal addressed appellant's taking argument as follows:

> "Plaintiff's argument that Civil Code section 3333.2 is constitutionally infirm . . . because it effectuates a taking without just compensation is premised on the notion that she, along with all other victims of medical malpractice, are entitled to a particular measure of damages. That claim was laid to rest by the Supreme Court when it held that a plaintiff has no constitutional property right or interest in the manner damages may be awarded, and that the Legislature possesses 'broad control over *the measure*, as well as *the timing*, of damages' and 'may expand or limit recoverable damages so long as its action is rationally related to a legitimate state interest.' (*Fein, supra*, at p. 158; emphasis in original; *American Bank & Trust Co. v. Community Hospital, supra*, 36 Cal.3d 359, 368-369.) Consistent with this conclusion was the court's further determination that when the Legislature decreased the measure of recovery for noneconomic damages, it was not required to compensate plaintiffs for any loss reduction occasioned thereby by providing them with a quid pro quo. (*Fein, supra*, at p. 157.) In light of these principles, plaintiff's contentions are meritless." Jurisdictional Statement 14a.

SUMMARY OF ARGUMENT

This is not the first time a California appellate decision upholding California Civil Code section 3333.2 against constitutional attack has been appealed to this Court. In

Fein v. Permanente Medical Group, 38 Cal.3d 137, 695 P.2d 665, 211 Cal.Rptr. 368 (1985), the California Supreme Court held section 3333.2 does not violate due process or equal protection. Fein appealed and this Court dismissed his appeal for want of a substantial federal question. *Fein v. Permanente Medical Group*, 474 U.S. 892 (1985).[1]

Now appellant brings section 3333.2 again before this Court, arguing it violates the Fifth Amendment's Takings Clause. Since section 3333.2 has survived a due process attack which was predicated in substantial part on the argument that the Legislature may not limit a pre-existing right without providing a *quid pro quo*, see *Fein*, 474 U.S., at 894-95 (White, J., dissenting), "it would be surprising indeed to discover now" *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, —, 106 S.Ct. 1018, 1025, 89 L.Ed. 2d 166, 178 (1986) that compensation is required under the Fifth Amendment.

Viewed on its face and as applied in this case, section 3333.2 does not violate the Takings Clause. First, appellant's claim for the common-law measure of noneconomic damages does not constitute property within the meaning of the Takings Clause. Property interests are created and their dimensions defined by sources independent of the Constitution, such as state law. Under California law, a plaintiff has no vested right in a particular measure of damages. This is consistent with this Court's previous

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[1] In *Roa v. Lodi Medical Group, Inc.*, 37 Cal.3d 920, 695 P.2d 164, 211 Cal.Rptr. 77 (1985), the California Supreme Court rejected a constitutional attack on California Business and Professions Code section 6146, which limits attorneys' fees in medical malpractice actions. This Court also dismissed the appeal in *Roa* for want of a substantial federal question. *Roa v. Lodi Medical Group, Inc.*, 474 U.S. 990 (1985).

statements that a person has no property, no vested interest, in any rule of the common law.

Even assuming arguendo that appellant's claim for the common-law measure of noneconomic damages is a species of property, there has been no taking. California has not appropriated any of plaintiff's assets for its own use. Rather, section 3333.2 constitutes regulatory action in response to a major health care crisis. It is a reasonable adjustment of the benefits and burdens of economic life to promote the common good. Plaintiff made no investment of any sort based on an expectation of recovery of the common-law measure of noneconomic damages should she be injured by medical malpractice. Section 3333.2 places no limits on plaintiff's recovery of $3,167,000 in economic damages and permits a substantial $250,000 award for noneconomic damages as well. When the attorneys' fee limitation enacted along with section 3333.2 is considered, as it must be, the impact on plaintiff is to reduce her net recovery under the jury's $5,500,000 total verdict by only about 17 percent. This is not so substantial as to constitute a taking under this Court's precedents.

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ARGUMENT

I.

CALIFORNIA CIVIL CODE SECTION 3333.2 IS PART OF A COMPREHENSIVE PACKAGE OF STATUTES DESIGNED TO ALLEVIATE A CRISIS IN CALIFORNIA'S HEALTH CARE SYSTEM CAUSED BY SKYROCKETING MEDICAL MALPRACTICE INSURANCE PREMIUMS.

In May 1975 the Governor of California convened the Legislature in extraordinary session to consider measures aimed at remedying a crisis in health care. The nature of the crisis was described by the California Supreme Court in *American Bank & Trust Co. v. Community Hospital*, 36 Cal.3d 359, 371, 683 P.2d 670, 677-78, 204 Cal.Rptr. 671, 678-79 (1984):

> "The problem . . . arose when the insurance companies which issued virtually all of the medical malpractice insurance policies in California determined that the costs of affording such coverage were so high that they would no longer continue to provide such coverage as they had in the past. Some of the insurers withdrew from the medical malpractice field entirely, while others raised the premiums which they charged to doctors and hospitals to what were frequently referred to as 'skyrocketing' rates. As a consequence, many doctors decided either to stop providing medical care with respect to certain high risk procedures or treatment, to terminate their practice in this state altogether, or to 'go bare,' i.e., to practice without malpractice insurance. The result was that in parts of the state medical care was not fully available, and patients who were treated by uninsured doctors faced the prospect of obtaining only unenforceable judgments if they should suffer serious injury as a result of malpractice."

See *id.*, at 363 n.1, 683 P.2d, at 672 n.1, 204 Cal.Rptr., at 673 n.1 (quoting the Governor's executive proclamation calling the Legislature into extraordinary session); *Hoffman v. United States*, 767 F.2d 1431, 1434 (9th Cir. 1985).

The Legislature, "which thoroughly investigated this matter through numerous hearings, audits and the like," *American Bank & Trust, supra*, 36 Cal. 3d, at 372, 683 P.2d, at 678, 204 Cal. Rptr., at 679, expressly found and declared

> " 'that there is a major health care crisis in the State of California attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system, severe hardships for the medically indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care available to citizens of this state.' " *Id.*, at 372 n.11, 683 P.2d, at 678 n.11, 204 Cal.Rptr., at 679 n.11.

The Legislature responded to the crisis by enacting the Medical Injury Compensation Reform Act of 1975 (MICRA),

> "a lengthy statute which attacked the problem on several fronts. In broad outline, the act (1) attempted to reduce the incidence and severity of medical malpractice injuries by strengthening governmental oversight of the education, licensing and discipline of physicians and health care providers, (2) sought to curtail unwarranted insurance premium increases by authorizing alternative insurance coverage programs and by establishing new procedures to review substantial rate increases, and (3) attempted to reduce the cost and increase the efficiency of medical malpractice litigation by revising a number of legal rules applicable to such litigation." *American Bank & Trust*, 36 Cal.3d, at 363-64, 683 P.2d, at 672, 204 Cal. Rptr., at 673.

MICRA provisions "made changes in existing tort rules in an attempt to reduce the cost of medical malpractice litigation, and thereby restrain the increase in medical malpractice insurance premiums." *Fein v. Permanente Medical Group, supra,* 38 Cal.3d, at 159, 695 P.2d, at 680, 211 Cal.Rptr., at 383. Specifically, these changes are designed to:

1. Permit the defendant to introduce evidence of collateral source recovery by the plaintiff and the plaintiff to introduce evidence of the amount paid or contributed to secure the right to such benefits. Cal. Civ. Code § 3333.1, subd. (a), upheld in *Fein,* 38 Cal.3d, at 164-67, 695 P.2d, at 784-86, 211 Cal.Rptr., at 387-90.

2. Eliminate the subrogation rights of a collateral source. Cal. Civ. Code § 3333.1, subd. (b), upheld in *Barme v. Wood,* 37 Cal.3d 174, 689 P.2d 446, 207 Cal.Rptr. 816 (1984).

3. Limit recovery of nonpecuniary loss to $250,000. Cal. Civ. Code § 3333.2, upheld in *Fein,* 38 Cal.3d, at 157-64, 695 P.2d, at 679-84, 211 Cal.Rptr., at 382-87.

4. Require periodic payment of any award for future damages which equals or exceeds $50,000. Cal. Code Civ. Proc. § 667.7, upheld in *American Bank & Trust.*

5. Limit contingent fee payments to attorneys. Cal. Bus. & Prof. Code § 6146, upheld in *Roa v. Lodi Medical Group, Inc., supra,* 37 Cal.3d 920, 695 P.2d 164, 211 Cal. Rptr. 77.

6. Shorten the statute of limitations. Cal. Code Civ. Proc. § 340.5, upheld in *Kite v. Campbell,* 142 Cal.App.3d 793, 191 Cal.Rptr. 363 (1983), *overruled on other grounds,*

Young v. Haines, 41 Cal.3d 883, 718 P.2d 909, 226 Cal.Rptr. 547 (1986).

7. Require 90 days' notice to the defendant before filing suit. Cal. Code Civ. Proc. §§ 364-65.

8. Permit arbitration agreements between doctors and patients. Cal. Code Civ. Proc. § 1295.

By these tort reforms and the other MICRA reforms in the areas of health care quality control and review of insurance premium increases[2]

> "the Legislature hoped (1) to restore insurance premiums to a level doctors and hospitals could afford, thereby inducing them to resume providing medical care to all segments of the community, and (2) to insure that insurance would in fact be available as a protection for patients injured through medical malpractice." *American Bank & Trust*, 36 Cal.3d, at 372, 683 P.2d, at 678, 204 Cal.Rptr., at 679.

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[2]Assemblyman Barry Keene, author of MICRA, explained:

> "A general policy (and . . . *political)* decision was made that all interested parties must sacrifice in order to reach a fair and rational solution to the insurance crisis. These included physicians, lawyers, insurance companies, and patients alike. [MICRA] was drafted to include all reforms in order to prevent any one interest group from sabotaging any single-objective bill."

Keene, "California's Medical Malpractice Crisis" in *A Legislator's Guide to the Medical Malpractice Issue* 27, 30 (1976, Health Policy Center, Georgetown University and The National Conference of State Legislatures), emphasis in original.

> "[B]y pitting the various concerned and powerful interest groups against one another, while preserving the delicate balance among them, we had a better chance of getting something out. This is called the 'equal bite' theory behind [MICRA]."

Id., at 33.

MICRA has had the desired impact. It created enough promise of stability to encourage doctors to form their own insurance carriers. By January 1982, 80 percent of the members of the California Medical Association were insured by physician-owned carriers or a cooperative trust, according to a CMA survey. California Medical Association, *Socioeconomic Report,* Vol. XXII, No. 5 (July/Aug. 1982), at 30. Only 6.1 percent of the CMA members surveyed were uninsured. *Ibid.*

II.

BOTH ON ITS FACE AND AS APPLIED IN THIS CASE, SECTION 3333.2 DOES NOT VIOLATE THE TAKINGS CLAUSE.

"The Fifth Amendment provides 'nor shall private property be taken for public use, without just compensation,' and applies to the States through the Fourteenth Amendment." *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. —, — n.4, 107 S.Ct. 2378, 2383 n.4, 96 L.Ed.2d 250, 261 n.4 (1987). In order to demonstrate that section 3333.2 deprives her of property without just compensation, plaintiff first must establish that her claim against Dr. Franklin for the common-law measure of noneconomic damages constitutes property for purposes of the Fifth Amendment. Then plaintiff must establish that her claim for the common-law measure of noneconomic damages was taken by California for a public purpose. As we explain below, plaintiff fails on both counts.

A. Plaintiff's Claim For The Common-Law Measure Of Noneconomic Damages Does Not Constitute Property Within The Meaning Of The Takings Clause.

As this Court has recognized, "'"[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984). The relevant principles of California law were recently stated by the California Supreme Court: "It is well established that a plaintiff has no vested property right in a particular measure of damages, and that the Legislature possesses broad authority to modify the scope and nature of such damages. [Citations.]" *American Bank & Trust*, 36 Cal.3d, at 368, 683 P.2d, at 676, 204 Cal.Rptr., at 677. Accord *Fein*, 38 Cal.3d, at 158, 695 P.2d, at 680, 211 Cal.Rptr., at 383 ("As our language in *American Bank* itself suggests, our past cases make clear that the Legislature retains broad control over *the measure*, as well as *the timing*, of damages that a defendant is obligated to pay and a plaintiff is entitled to receive, and that the Legislature may expand or limit recoverable damages so long as its action is rationally related to a legitimate state interest," emphasis in original). These principles are in accord with this Court's statement in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978):

> "Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.' [Citation.] The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law,

> to attain a permissible legislative object,' [citation], despite the fact that 'otherwise settled expectations' may be upset thereby. [Citations.] Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts. [Citations.]''

Other authorities supporting the view that plaintiff's claim for the common-law measure of noneconomic damages is not property include *Hammond v. United States*, 786 F.2d 8, 11-12, 15 (1st Cir. 1986); *Ducharme v. Merrill-National Laboratories*, 574 F.2d 1307, 1309 (5th Cir.), *cert. denied*, 439 U.S. 1002 (1978). Contra *In re Consol. U.S. Atmospheric Testing Litigation*, 820 F.2d 982 (9th Cir. 1987); *In re Aircrash in Bali, Indonesia, on April 22, 1974*, 684 F.2d 1301, 1312 (9th Cir. 1982).

Accordingly, although the jury assessed the amount of plaintiff's noneconomic damages at $2,332,762 under common-law standards, Jurisdictional Statement 4a, plaintiff did not have a vested property right in the full amount awarded by the jury. Plaintiff's cause of action against Dr. Franklin accrued in 1977. Jurisdictional Statement 2a. Civil Code section 3333.2, placing a $250,000 limit on the common-law right of recovery of noneconomic damages against a health care provider, was enacted in 1975. *Ibid.* Thus, plaintiff's cause of action did not accrue until after passage of section 3333.2. The only way plaintiff could claim a vested property right in the full amount awarded by the jury would be if plaintiff had obtained a final, unreviewable judgment in that amount prior to enactment of section 3333.2. See *Hammond*, 786 F.2d, at 12. She did not. The jury's award of noneconomic damages under common-law standards is not plaintiff's property within the meaning of the Takings Clause. The California Court

of Appeal properly ordered it reduced to $250,000 pursuant to section 3333.2, Jurisdictional Statement 19a-20a.

B. Even Assuming Arguendo That Plaintiff's Claim For The Common-Law Measure Of Noneconomic Damages Is Property, There Has Been No Taking.

"The framework for examining the question of whether a regulation of property amounts to a taking requiring just compensation is firmly established and has been regularly and recently reaffirmed." *Hodel v. Irving*, 481 U.S. —, —, 107 S.Ct. 2076, 2082, 95 L.Ed.2d 668, 678 (1987).

> "In evaluating whether governmental regulation of property constitutes a 'taking' we have 'eschewed the development of any set formula . . . and have relied instead on an ad hoc, factual inquiry into the circumstances of each particular case.' [Citation.] 'To aid in this determination, however, we have identified three factors which have "particular significance": (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." [Citation.]' " *Bowen v. Gilliard*, 483 U.S. —, —, 107 S.Ct. 3008, 3020, 97 L.Ed.2d 485, 504 (1987).

Neither of these three factors points in plaintiff's favor.

We discuss the three factors in reverse order, beginning with "the character of the governmental action." Section 3333.2 does not permit a physical invasion of plaintiff's property. California has not appropriated any of plaintiff's assets for its own use. Rather, section 3333.2 constitutes regulatory action which places a $250,000 ceiling on plaintiff's recovery of noneconomic damages, and

that of all persons injured by medical malpractice, in order "to reduce the cost of medical malpractice litigation, and thereby restrain the increase in medical malpractice insurance premiums." *Fein*, 38 Cal.3d, at 159, 695 P.2d, at 680, 211 Cal.Rptr., at 383; see *Hoffman v. United States*, *supra*, 767 F.2d, at 1437. "[T]he Legislature was acting in a situation in which it had found that the rising cost of medical malpractice insurance was posing serious problems for the health care system in California, threatening to curtail the availability of medical care in some parts of the state and creating the very real possibility that many doctors would practice without insurance, leaving patients who might be injured by such doctors with the prospect of uncollectible judgments." *Fein*, 38 Cal.3d, at 158, 695 P.2d, at 680, 211 Cal.Rptr., at 383; *Hoffman*, 767 F.2d, at 1437. "Faced with the prospect that, in the absence of some cost reduction, medical malpractice plaintiffs might as a realistic matter have difficulty collecting judgments for *any* of their damages—pecuniary as well as nonpecuniary—the Legislature concluded that it was in the public interest to attempt to obtain some cost savings by limiting noneconomic damages."[3] *Fein*, 38 Cal.3d, at 160, 695 P.2d., at 681, 211 Cal.Rptr., at 384, emphasis in original.

As with the limitation on liability for nuclear accidents involved in *Duke Power*, section 3333.2 "emerges as a classic example of an economic regulation—a legislative effort to structure and accommodate 'the burdens and ben-

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[3] The California Supreme Court pointed out "the inherent difficulties in placing a value on such [noneconomic] losses, [and] the fact that money damages are at best only imperfect compensation for such intangible injuries . . . ." *Fein*, 38 Cal.3d, at 159, 695 P.2d, at 680-81, 211 Cal.Rptr., at 384.

efits of economic life.' " *Duke Power*, 438 U.S., at 83. When interference with property rights "arises from some public program adjusting the benefits and burdens of economic life to promote the common good," the statute is less likely to constitute a taking. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, *reh. denied*, 439 U.S. 883 (1978). For example, in *Connolly v. Pension Benefit Guaranty Corp., supra*, 475 U.S. 211, this Court upheld a federal law requiring an employer who withdraws from a multiemployer pension plan to pay a share of the plan's unfunded vested benefits even though this liability had not been established in the original pension plan trust agreement. The Court held this was not a taking but rather a reasonable economic regulation.

Section 3333.2 was enacted in the public interest. The Legislature specifically found there was a major health care crisis in California. The State's exercise of its police power to resolve this crisis and protect the public health and welfare was justified, and does not require compensation. " 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law' . . . . " *Penn Central*, 438 U.S., at 124.

As to the second factor, section 3333.2 interferes with no reasonable investment-backed expectations of plaintiff. Plaintiff made no investment of any sort based on an expectation of recovery of the common-law measure of noneconomic damages should she be injured by medical malpractice. At the time of her injury, section 3333.2, placing a $250,000 ceiling on recovery of noneconomic damages, had been in effect for two years. For all the reasons ex-

pressed above, where we argue that plaintiff's claim for the common-law measure of noneconomic damages does not even constitute property because there is no vested interest in any rule of the common law, plaintiff's claim certainly does not rise to the level of a reasonable, investment-backed expectation. See *Bowen v. Gilliard, supra,* 483 U.S., at —, 107 S.Ct., at 3020-21, 97 L.Ed.2d, at 505; *In re Consolidated U.S. Atmospheric Testing Litigation, supra,* 820 F.2d, at 989.

The third factor is the economic impact of section 3333.2 on plaintiff. The statute does not abrogate plaintiff's cause of action against Dr. Franklin; it affects only the remedy. And even the affect on the remedy is quite limited. "[T]he Legislature placed no limits whatsoever on a plaintiff's right to recover for all of the economic, pecuniary damages—such as medical expenses or lost earnings—resulting from the injury, but instead confined the statutory limitations to the recovery of noneconomic damages, and — even then — permitted up to a $250,000 award for such damages." *Fein,* 38 Cal.3d, at 159, 695 P.2d, at 680, 211 Cal.Rptr., at 383, emphasis deleted. Plaintiff still will recover a total of $2,917,000 from Dr. Franklin even after section 3333.2 is applied to reduce her noneconomic damages to $250,000.[4] Jurisdictional Statement 40a. The statute does not impair full recovery of plaintiff's economic losses, and it permits a very substantial $250,000 recovery for noneconomic losses.

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[4] Plaintiff's total recovery for her injuries is $3,417,000, which includes a $500,000 settlement with a codefendant. When the settlement is set off against the verdict after noneconomic damages are reduced to $250,000, Dr. Franklin's obligation is $2,917,000. Jurisdictional Statement 40a.

Furthermore, the attorneys' fee limitation in medical malpractice cases enacted at the same time as section 3333.2 in effect shifts much of the burden imposed by section 3333.2 from plaintiff to her attorneys. See *Roa v. Lodi Medical Group, Inc., supra*, 37 Cal.3d, at 932, 695 P.2d, at 171, 211 Cal.Rptr., at 84. California Business and Professions Code section 6146 permits a maximum attorneys' fee of $383,391 on plaintiff's $3,417,000 total recovery. Thus, plaintiff's net recovery is $3,033,609. Without the MICRA provisions, and assuming a conservative 33-1/3 percent contingent fee (40 percent was more the norm in medical malpractice cases), plaintiff's net recovery would have been $3,666,685 ($5,500,000 verdict minus an attorneys' fee of $1,833,315). In other words, considering the impact on plaintiff's recovery of all the MICRA provisions working together, including the attorneys' fee limitation.[5] plaintiff's *net* recovery is only reduced by $633,076 (about 17 percent).[6] [7]

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[5] " '[W]here an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety.' " *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. —, —, 107 S.Ct. 1232, 1248, 94 L.Ed.2d 472, 496 (1987). And see *Bowen*, 483 U.S., at —, 107 S.Ct., at 3020, 97 L.Ed.2d, at 505; *Penn Central*, 438 U.S., at 137.

[6] Assuming a 40 percent contingent fee instead of 33-1/3 percent, plaintiff's net recovery would be reduced by only $266,391 (about 8 percent).

[7] In *Shanghai Power Co. v. United States*, 4 Cl.Ct. 237, 246 n.16 (1983), the court observed that the President's settlement of the plaintiff's $144 million claim against the People's Republic of China for $20 million "reduces the claim by only about 85%. In appropriate circumstances, diminutions in value in that amount or greater have been held not to amount to a taking." In the instant case, the diminution in value is *far* less than 85 percent.

Whatever the precise economic impact on plaintiff's claim against Dr. Franklin, it certainly is not so substantial as to constitute a taking under this Court's precedents.

CONCLUSION

For the reasons stated, the judgment of the California Court of Appeal should be summarily affirmed or, in the alternative, this appeal should be dismissed for want of a substantial federal question.

Dated: November 5, 1987.

Respectfully submitted,

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